IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 12TH NOVEMBER 2007 / 21ST KARTHIKA 1929

RSA.No. 922 of 2007

(AS.76/2002 OF ADDL.DISTRICT COURT (ADCHOC)-II, PATHANAMTHITTA OS.482/1996 OF MUNSIFF'S COURT, PATHANAMTHITTA)

APPELLANTS/RESPONDENTS/1 & 3/PLAINTIFFS 1 & 3

1. **PONNAMMA, AGED 73 YEARS,**
   W/O.MR.KUTTAPPAN, LAKSHMI VILASOM,
   PRAMADOM MURI, PRAMADOM VILLAGE,
   KOZHENCHERRY TALUK, PATHANAMTHITTA.

2. **NIRMALAKUMARI, 53 YEARS,**
   W/O.MR.KARTHIKEYAN, PALLATHUKIZHAKKETHIL,
   IYCKADAVU MURI, KODUMON VILLAGE,
   ADOOR TALUK, PATHANAMTHITTA DISTRICT.

BY ADV. SRI. ALEXANDER PETER

RESPONDENTS: APPELLANT/DEFENDANT

1. **B.V.ANITHAKUMARI, AGED 35 YEARS,**
   W/O.MR.REGHUNATHA PRASAD, AISWARYA HOUSE,
   PRAMADOM MURI, PRAMADOM VILLAGE,
   KOZHENCHERRY TALUK, PATHANAMTHITTA DISTRICT.

(ADDL. RESPONDENTS (LEGAL HEIRS OF LATE SANATHAMMA, EXPIRED ON 10/09/2007) END RESPONDENT IN APPEAL 76/02/2ND PLAINTIFF IN O.S. NO. 482/296)

2. **KARTHIKEYAN.V**
   (HUSBAND OF SANTHAMMA), AGED 62 YEARS,
   S/O.VASUDEVAN, 'KARTHIKA', KOTTARKAVU,
   MAVELIKKARA VILLAGE, MAVELIKKARA TALUK.

3. **SIJU KURIAKOSE, (S/O.SANTHAMMA),**
   AGED 26 YEARS, S/O.KARTHIKEYAN, 'KARTHIKA',
   KOTTARKAVU, MAVELIKKARA VILLAGE, MAVELIKKARA TALUK

4. SINI KARTHIKEYAN, (D/O.SANTHAMMA),
AGED 24 YEARS, D/O.KARTHIKEYAN,
'KARTHIKA', KOTTARKAVU, MAVELIKKARA VILLAGE,
MAVELIKKARA TALUK.

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 12/11/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

.....

R.S.A.No. 922 OF 2007

.....

DATED THIS THE 12th DAY OF NOVEMBER, 2007

JUDGMENT

Plaintiffs in O.S.482 of 1996 on the file of Munsiff Court, Pathanamthitta are the appellants. Defendant is the respondent. Appellants instituted the suit seeking a decree for declaration of title and recovery of possession. Plaint schedule property admittedly originally belonged to deceased Reghunatha Prasad. Appellants contended that under Ext.A6 will executed by deceased Reghunatha Prasad, whereunder he bequeathed plaint schedule property in their favour they have title to the plaint schedule property and respondent has no right over the property and appellants are entitled to a decree for declaration of title and recovery of possession of the plaint schedule property.

2. Respondent in the written statement disputed the claim of appellants. It was contended that the relationship of the appellants with the deceased is true and Reghunatha Prasad was a man of ill health and sickness and he had originally married Iswarya and after his divorce with Iswarya, Reghunatha Prasad married respondent on 18.1.1996 at Murinjamangalam temple

and thereafter they have been living as husband and wife. It was also contended that after solemnization of the marriage, they entered into a marriage udampadi which was registered as document No.6/96 of Konny SRO and Reghunatha Prasad had not executed Ext.A6 will and it is a fabricated one. It was also contended that Reghunatha Prasad was admitted at Aravind Eye Hospital, Madurai for cataract surgery on 17.6.1996 and surgery was conducted on 18.6.1996 and he was discharged on 20.6.1996 with a direction to be present there for review and on the evening of 21.6.1996 he returned home and after returning back, he was not physically and mentally sound to execute any will and on 25.6.1996 respondent was at the bed-side of her husband and he did not execute Ext.A6 on 25.6.1996 as alleged and appellants are not entitled to the declaration or recovery of possession sought for.

3. Learned Munsiff, on the evidence of PWs 1 to 7, Dws 1 & 2, Exts.A1 to A8, Exts.B1 to B16 and Ext.X1 series upheld Ext.A6 will and granted a decree declaring the title of appellants and directed respondents to surrender possession of the property. Respondents challenged the decree and judgment before District Court, Pathanamthitta in A.S.76 of 2002.

Learned Additional District Judge, on reappreciation of evidence, found that Ext.A6 will was not proved to be executed by deceased Reghunatha Prasad and set aside the decree and dismissed the suit. It is challenged in the second appeal.

4. Learned counsel appearing for appellants was heard. The argument of the learned counsel is that first appellate court did not properly appreciate the evidence and from the evidence of PW4, the scribe, and Pws 5 and 6, attesting witnesses, execution of Ext.A6 will was proved and hence under Ext.A6, appellants have title to the plaint schedule property and respondent has no right over the same and therefore appellants are entitled to the decree sought for. Learned counsel argued that when trial court has appreciated the evidence in the proper perspective and upheld Ext.A6 will, first appellate court should not have interfered with the decree and the decree and judgment passed by first appellate court are unsustainable.

5. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal. Appellants are claiming title under Ext.A6 will. Only if Ext.A6 will is proved to be the last will executed by deceased Reghunatha Prasad, of his free will and volition appellants can succeed in their claim for

title to the plaint schedule property. Though trial court, in appreciation of evidence, upheld Ext.A6 will, first appellate court on reappreciation of evidence found that evidence was not properly appreciated by the trial court and there are circumstances indicating that Ext.A6 will was not executed by deceased Reghunatha Prasad and held that execution of Ext.A6 will was not proved and appellants did not have title to the property. The argument of learned counsel is that appreciation of evidence by first appellate court is not proper and it warrants interference.

6. Exercising the powers under Section 100 of Code of Civil Procedure, reappreciation of evidence is not warranted unless appreciation of evidence by first appellate court was so perverse that it cannot be upheld or the findings of the first appellate court was not based on the evidence on record. First appellate court has given cogent and convincing reasons for setting aside the finding of trial court regarding execution of the will. Though execution of Ext.A6 will was disputed in the written statement and it was specifically contended that Ext.A6 will was not executed by deceased Reghunatha Prasad and it is a fabricated one, appellants did not send the will to an expert for

comparing the signature seen in Ext.A6 will with the admitted signatures of deceased Reghunatha Prasad. They sought to prove the will by examining PW1 Manager of the Bank and by producing Ext.A1, A2 and A7 to prove the signature. That evidence was accepted by the trial court. First appellate court found that a scrutiny of Ext.A6 casts doubt about its genuineness. A photocopy of Ext.A6 was made available by learned counsel. A perusal of it supports the finding of first appellate court. It is seen that the signature of the testator seen in Ext.A6 in each of the pages is exactly at the same place and not below the name of the testator written therein which should ordinarily be the case indicating that it was written in papers which were signed earlier. The way in which Ext.A6 will was prepared and the fact that on each of the page attestors signed all disclose a concious attempt to make it appear as genuine. First appellate court, appreciated the evidence of Pw4, the Scribe and Pws 5 and 6, the attesting witnesses and found that their evidence cannot be relied on to uphold the execution. First appellate court also found that when admittedly Reghunatha Prasad had several bank accounts, Ext.A6 mentions only about one account, in which respondent was shown as the nominee

indicating that Ext.A6 was created after the death of the deceased Reghunatha Prasad. First appellate court also pointed out that there are factual discrepancies in Ext.A6 which would not have been there if it was genuinely executed by the deceased. It is for these reasons first appellate court held that Ext.A6 will was not proved. It is a finding of fact. It cannot be said that the finding was not based on the evidence on record or that evidence was overlooked. Appreciation of evidence was also proper and at any rate is not pervere. The finding of fact by the first appellate court being the last court of facts cannot be interfered. I do not find any substantial question of law involved in the appeal.

Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-